

EX-2003-1009 Attachment #2
May 22, 2003, Clarification of Configuration Proposal

APPENDIX A

Clarification of April 25, 2003 Proposal

May 22, 2003

The grantee-plaintiffs¹ each submit this document to clarify their April 25, 2003 Configuration Proposal in response to questions raised by the Legal Services Corporation ("LSC") in its May 9, 2003 letter to the Court.² Each of the grantee-plaintiffs desires authorization from LSC to operate affiliate organizations pursuant to their April 25, 2003 proposal as clarified herein:

1. **Legal separation** — Each of the grantee-plaintiffs (also referred to as "LSC grantee affiliates") proposes to establish a legally separate corporation (the "non-LSC grantee affiliate") with its own articles of incorporation and bylaws, in accordance with the laws of the State of New York.
2. **Easily distinguishable names** — The LSC grantee affiliates propose, at this time, to use the following names for each respective non-LSC grantee affiliate:³

LSC grantee affiliate
Legal Services for New York City
South Brooklyn Legal Services
Farmworker Legal Services of
New York

Non-LSC grantee affiliate
New York City Justice Center
South Brooklyn Justice Center
Farmworker Justice Center

3. **Separate boards of directors** — The boards of directors of the LSC grantee affiliates, and of the non-LSC grantee affiliates, will be separate: a) the boards of the respective LSC and non-LSC affiliates will meet separately and maintain separate records; and b) the membership of the boards of directors of the LSC and non-LSC affiliates will be

¹ The phrase "grantee-plaintiffs" refers to Legal Services for New York City ("LSNY"), South Brooklyn Legal Services, and Farmworker Legal Services of New York.

² As instructed by the Court, the grantee-plaintiffs each submitted their Configuration Proposal for review by LSC on April 25, 2003. See Ltr. from Burt Neuborne to the Hon. Frederic Block, U.S.D.J., dated April 25, 2003. Two weeks later, LSC rejected the grantee-plaintiffs' Configuration Proposal. See Ltr. from Stephen Ascher to the Hon. Frederic Block, U.S.D.J., dated May 9, 2003 (attaching LSC External Opinion # EX-2003-1008, LSC Office of Legal Affairs, dated May 8, 2003).

³ The plaintiff-grantees are willing to confer with LSC, at its request, on the exact names of each non-LSC grantee affiliate.

coextensive at the outset,⁴ but this may change over time depending on various factors. Moreover, plaintiff-grantee LSNY would prefer to operate through an affiliate structure in which LSNY would possess authority to determine the composition of the board of the New York City Justice Center.

4. **No subsidy** — No LSC grantee affiliate will transfer any LSC funds to a non-LSC grantee affiliate.⁵ Affiliated organizations will apportion fair value for expenses in accordance with generally accepted accounting principles and the requirements of the LSC Accounting Guide for LSC recipients, the LSC Office of Inspector General Audit Guide for Recipients and Auditors, and LSC regulation 45 C.F.R. § 1630, Cost Standards and Procedures, which provides “uniform standards for allowability of costs” charged to LSC grants, including both direct costs (e.g., salaries) and indirect costs (e.g., utilities and other forms of overhead costs). In particular, affiliated organizations will allocate indirect costs pursuant to 45 C.F.R. § 1630.3(f), which governs the allocation of indirect costs by LSC grantees, and by separately identifying the total costs for restricted activities and treating these costs as disallowed costs pursuant to 45 C.F.R. § 1630.2(d).⁶
5. **Employee timekeeping measures** — Any employee in the category of “legal personnel” who is employed part-time by an LSC grantee affiliate and by a non-LSC grantee affiliate, will maintain detailed time records for the work performed for each affiliate. These records will comply with LSC’s timekeeping regulation, 45 C.F.R. § 1635, including the requirement that an LSC grantee:

shall require any attorney or paralegal who works part-time for the recipient and part-time for an organization that engages in restricted activities to certify in writing that the

⁴ LSC’s program integrity regulation expressly permits an LSC grantee to control the activities of its non-LSC grantee affiliate through such overlapping board membership, as is required by the First Amendment. See *Legal Aid Soc’y of Haw. v. Legal Servs. Corp.*, 981 F. Supp. 1288, 1297 (D. Haw. 1997); Use of Non-LSC Funds, Transfers of LSC Funds, Program Integrity, 62 Fed. Reg. 27695, 27697 (May 21, 1997) (codified at 45 C.F.R. § 1610) (stating that “because the [LSC program integrity] standards will allow control at the Board level, recipients will have an avenue through which to engage in restricted activities”); LSC, Guidance in Applying the Program Integrity Standards, attached to LSC External Opinion # EX-2003-1008 (“A recipient may have the same or overlapping Board of Directors as another organization which engages in restricted activity.”).

⁵ See LSC External Opinion at 8 (requesting explicit statement concerning no transfer of LSC funds).

⁶ See LSC External Opinion at 9 (requesting “some sense” of how apportionments will be made).

attorney or paralegal has not engaged in restricted activity during any time for which the attorney or paralegal was compensated by the recipient or has not used recipient resources for restricted activities. The certification requirement does not apply to a *de minimis* action related to a restricted activity.

45 C.F.R. § 1635.3(d).

Additionally, any employee in the category of "non-legal personnel" (i.e., support personnel) who is employed part-time by an LSC grantee affiliate and by a non-LSC grantee affiliate, will maintain personnel activity reports, pursuant to LSC regulation 45 C.F.R. § 1630.3(d), for work performed for each affiliate. The regulation, which provides standards governing allowability of costs under LSC grants or contracts, incorporates the detailed guidance about personnel activity reports contained in Office of Management and Budget ("OMB") Circular A-122, Cost Principles for Non-Profit Organizations, Attachment B, para. 6(l)(2) (Aug. 29, 1997), a copy of which is attached hereto as Ex. 1.⁷

No legal personnel, and no non-legal personnel, will engage in any LSC-funded activities while working as an employee of a non-LSC grantee affiliate.⁸

6. **Signage and disclaimers** — A "disclaimer" will be provided in writing individually to all clients, prospective clients, opposing attorneys and other visitors entering the premises of the LSC grantee affiliate and of the non-LSC grantee affiliate. The disclaimer will also be provided in writing individually to all clients and prospective clients who otherwise meet in-person with an employee of an affiliate. The written disclaimer will be printed on an 8.5 x 11 inch sheet of paper in 12-point type. It will also be published on web sites maintained by the affiliates, and in the places and manners described in paragraph six of the grantee-plaintiffs' April 25, 2003 proposal.

⁷ LSC itself has determined that these timekeeping and cost allocation rules are adequate to ensure that no LSC funds are spent to directly or indirectly subsidize certain privately funded activities, such as lobbying a state legislature for increased legal services funding, that LSC grantees are permitted to conduct in the same offices and with the same employees as they conduct their LSC-funded activities. See Ltr. from Burt Neuborne to the Hon. Frederic Block, U.S.D.J., dated April 25, 2003, at 5-6 & nn.12, 13.

⁸ This point responds to LSC's stated concern that "[i]f any personnel of the non-LSC affiliate engage in LSC-funded activities then the non-LSC affiliate is subject to LSC restrictions." See LSC External Opinion at 4 n.3. In fact, performance of work in such circumstances would seem to have the opposite effect, as it would constitute a subsidy of the LSC grantee by the non-LSC affiliate.

An oral disclaimer will be made in-person, and in telephone communications, to all individual clients and prospective clients. In addition to the written disclaimers to courts and government officials provided in paragraph six of the grantee-plaintiffs' April 25, 2003 proposal, disclaimers will also be made orally to all individual judges, opposing attorneys, government officials, journalists and others who come into contact with either affiliate.

For example, South Brooklyn Legal Services and the affiliated South Brooklyn Justice Center will present the following written and oral disclaimer (or a disclaimer containing similar text to the same effect) to all clients, prospective clients, and others identified above in this paragraph six:

South Brooklyn Legal Services ("SBLs") and the South Brooklyn Justice Center (the "Justice Center") are separate, independent non-profit corporations. SBLs receives funds from the Legal Services Corporation ("LSC") to provide certain approved categories of legal assistance. Use of these funds from LSC is restricted by federal law. The Justice Center does not receive any LSC funds. Congress has refused to allow LSC funds to be used to finance the work of the Justice Center. Nevertheless, SBLs and the Justice Center cooperate to serve the legal needs of low-income individuals and families in South Brooklyn.⁹

In addition, the non-LSC grantee will include the following disclaimer (or similar text to the same effect) in all client retainer agreements:

I have read and understood the following: The South Brooklyn Justice Center (the "Justice Center") is representing me. The Justice Center does not receive any Legal Services Corporation ("LSC") funds. Congress has refused to allow LSC funds to be used to finance the work of the Justice Center.

⁹ This text derives in part from a disclaimer that the LSC Office of Inspector General ("OIG") has required to be published, in accordance with the LSC program integrity regulation, on a web site shared by an LSC grantee affiliate and a non-LSC grantee affiliate in Oregon. See Lane County Legal Aid Service and Lane County Law and Advocacy Clinic homepage, at <http://www.lanecountylegalservices.org/> (last visited May 19, 2003), attached hereto as Ex. 2; LSC OIG, Review of Grantee's Transfer of Funds, and Compliance with Program Integrity Standards, Grantee: Lane County Legal Aid Service, Inc., Report No. AU 02-01 (Oct. 2001), attached as Ex. 26 to Decl. of Laura K. Abel, dated Dec. 14, 2001.

In addition, the LSC grantee will include the following disclaimer (or similar text to the same effect) in all client retainer agreements:

I have read and understood the following: South Brooklyn Legal Services ("SBLS") is representing me. SBLS receives funds from the Legal Services Corporation ("LSC") to provide certain approved categories of legal assistance. Federal law restricts the use of these LSC funds and all other funds provided to SBLS.

Affiliates will produce these disclaimers in both English and Spanish, and will, pursuant to existing office policies, provide additional translation into other languages.

7. **Equipment** — The respective affiliates propose to share equipment and physical resources, including, telephone lines, computers, case management systems, libraries, legal research facilities, office furnishings, printers, fax machines and web sites.
8. **Physical premises** — The respective affiliates propose to operate in one physical location with no physical separation beyond that degree of physical separation required of other non-profit federal grantees by Presidential Executive Order No. 13279, 67 Fed. Reg. 77141 (Dec. 12, 2002), entitled Equal Protection of the Laws for Faith-based and Community Organizations. The standards contained in Executive Order No. 13279, applied in the context of legal services programs, would permit the LSC and non-LSC affiliates to operate in a single physical location, but would require the non-LSC grantee affiliate to provide LSC-restricted services "separately in time or location from any programs or services supported" with LSC funds. *Id.*

More specifically, these standards would require, for example, that a non-LSC grantee affiliate conduct its LSC-restricted activities either in a room separate from any room in which its LSC grantee affiliate is simultaneously conducting LSC-approved activities, or in the same room but at separate times. *See* White House Office of Faith-Based and Community Initiatives, Guidance to Faith-Based and Community Organizations on Partnering With the Federal Government, p. 7 (Dec. 12, 2002), attached as Ex. B to Decl. of Laura K. Abel, dated March 6, 2003.

9. **Employee time** — The LSC and non-LSC affiliates propose to share all legal, support and supervisory personnel (including an Executive Director, who will direct both programs). No personnel will engage in LSC-funded activities while working in the capacity as an employee of a non-LSC grantee affiliate.
10. **Intake** — The respective affiliates propose to share a common intake and allocation mechanism to refer clients and cases between the affiliates. As described in paragraph six above, an individual disclaimer will be provided to each individual client or prospective client who contacts either affiliate.